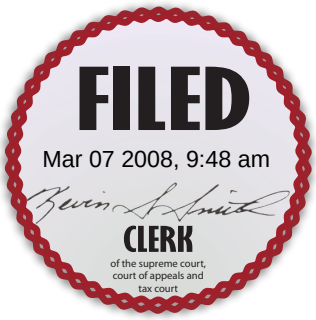

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IN THE
COURT OF APPEALS OF INDIANA

BOBBY A. LOMAX,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0708-PC-468
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
The Honorable Amy J. Barber, Magistrate
Cause No. 49G02-0105-PC-107986

March 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Bobby A. Lomax ("Lomax") appeals the denial of his petition for post-conviction relief, which challenged his conviction for Murder, a felony.[1] We affirm.

Issues

Lomax presents three issues for review:

I. Whether he was denied the effective assistance of trial counsel when counsel failed to challenge an inaccurate voluntary manslaughter instruction;

II. Whether he was denied the effective assistance of trial counsel when counsel failed to tender an involuntary manslaughter instruction; and

III. Whether he was denied the effective assistance of appellate counsel when counsel omitted an instructional issue.

Facts and Procedural History

On direct appeal, this Court recited the underlying facts as follows:

> The facts most favorable to the judgment reveal that on April 28, 2001, Herbert Howard and his friend Ricky Prince went to the home of Howard's sister, Shanel Lomax, to pick up Howard's nephews. When they arrived, they heard Shanel and Lomax, her husband, yelling at each other and observed Shanel crying. Shanel told them that Lomax had pulled a knife on her and had thrown it at her. Howard and Prince told Lomax to leave the home, and when Lomax refused, the three men got into a physical altercation. Howard later apologized to Lomax for the altercation, but Lomax would not accept an apology from Prince.
>
> On the morning of May 11, 2001, Shanel and Lomax went to the office of Pyramid Construction, a company owned by Howard, to pick up their last paychecks. Pyramid Construction had employed both Shanel and Lomax, and Prince was also an employee of the company. When Shanel and Lomax arrived at Pyramid Construction, Howard and the company's co-owner were in the building along with Prince and two other employees. Shanel and Lomax then got into an argument with Howard, and Lomax left the building while continuing to argue with Howard. Once outside the building, Lomax said

[1] Ind. Code § 35-42-1-1.

> "It's not over with. Tell Rick [Prince] to come out here for he can feel the heat." Tr. p. 150. Lomax then pulled a gun from his pocket, ran back into the building, and shot Prince once in the chest. Lomax continued to fire shots at Prince as Prince fled outside the building. Prince later died from the gunshot wound to his chest.
>
> On May 16, 2001, the State charged Lomax with Count I, Murder;[2] Count II, Unlawful Possession of a Firearm by a Serious Violent Felon as a Class B felony;[3] and Count III, Carrying a Handgun Without a License as a Class A misdemeanor,[4] which had an enhancement to a Class C felony because of a prior felony conviction. The State also alleged that Lomax was a habitual offender.[5] Following a jury trial, the jury found Lomax guilty of Murder and Carrying a Handgun Without a License as a Class A misdemeanor. The State then dismissed the charge of Unlawful Possession of a Firearm by a Serious Violent Felon, and Lomax admitted that he was a habitual offender. On May 8, 2002, the trial court sentenced Lomax to fifty-five years on his murder conviction enhanced by thirty years by the habitual offender finding to be served concurrent with a one-year sentence on the handgun conviction.

Lomax v. State, No. 49A02-0206-CR-459, slip op. 2-3 (Ind. Ct. App. April 2, 2003).

On March 4, 2005, Lomax filed his pro-se petition for post-conviction relief, which was amended on December 15, 2006. The post-conviction court conducted hearings on March 14 and April 18, 2007. On June 27, 2007, Lomax was denied post-conviction relief. This appeal ensued.

Discussion and Decision

I.A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v.

[2] Ind. Code § 35-42-1-1.

[3] Ind. Code § 35-47-4-5.

[4] Ind. Code §§35-47-2-1, 35-47-2-23(c).

[5] Ind. Code § 35-50-2-8.

State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

Ineffectiveness of counsel claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id.

I.B. Ineffectiveness – Voluntary Manslaughter Instruction

Lomax argues that he was denied the effective assistance of trial counsel because counsel acquiesced in the giving of a "fundamentally erroneous" instruction on voluntary manslaughter. Appellant's Brief at 13.

The trial court's final instruction on voluntary manslaughter, left unchallenged by trial and appellate counsel, provides in relevant part as follows:

> You are hereby instructed that the crime of Voluntary Manslaughter, a Class A felony, is a lesser-included offense of Murder, a felony as charged in Count I of the information. If you find the defendant Bobby A. Lomax not guilty of Murder, a felony, as charged in Count 1, you must then determine if Bobby A. Lomax is guilty of the lesser-included offense of Voluntary Manslaughter, a Class A felony.
>
> The crime of Voluntary Manslaughter is defined by statute as follows:
>
> A person who knowingly or intentionally kills another human being by means of a deadly weapon while acting under sudden heat commits Voluntary Manslaughter, a Class A felony.
>
> To convict the Defendant of Voluntary Manslaughter, the State must have proved each of the following elements:
>
> The Defendant, Bobby A. Lomax
>
> 1. knowingly
> 2. killed
> 3. Ricky Prince
> 4. by means of a deadly weapon
> 5. in sudden heat.
>
> The existence of sudden heat is a mitigating factor that reduces what otherwise would be Murder to Voluntary Manslaughter. However, this sudden heat must have been brought about by sufficient provocation to excite in the mind of the Defendant such emotions as either anger, rage, sudden resentment or terror as may be sufficient to obscure the reason of an ordinary man and to render the Defendant incapable of cool reflection. The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you cannot find the Defendant guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Voluntary Manslaughter, a Class A felony.

(App. 147-48.) Voluntary manslaughter is a lesser-included offense of murder, distinguishable by the factor of the defendant having killed while acting under sudden heat. Earl v. State, 715 N.E.2d 1265, 1267 (Ind. 1999). It is well settled in Indiana that sudden

heat is not an element of voluntary manslaughter. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002). Rather, once a defendant presents evidence of sudden heat, the State bears the burden of disproving its existence beyond a reasonable doubt. Id. Accordingly, the instruction at issue is erroneous in that it advised the jury that the State must have proved the existence of sudden heat. Had defense counsel objected and tendered an appropriate instruction, the trial court would have been afforded the opportunity to avert this error.

However, we are not persuaded by Lomax's claim that his counsel acquiesced in the giving of a fundamentally erroneous instruction. Our Supreme Court has held that a substantially similar instruction does not amount to fundamental error. Bane v. State, 587 N.E.2d 97, 100 (Ind. 1992), reh'g denied. Accord Isom v. State, 651 N.E.2d 1151, 1153 (Ind. 1995). The instruction in Bane improperly suggested to the jury that sudden heat is an element that must be proven beyond a reasonable doubt by the State, rather than a mitigator, but also cited the voluntary manslaughter statute and informed the jury that sudden heat was a mitigating factor. 587 N.E.2d at 100-101. Our Supreme Court concluded that the challenged instruction was "inartfully drafted" and "technically erroneous," but that it did not "constitute fundamental error because it did not deprive the defendant of his due process rights." Id. at 101. Here, the instruction suffered from the same infirmity, but also quoted the language of the voluntary manslaughter statute[6] in one paragraph and informed the jury that sudden heat was a mitigating factor. The jury was specifically informed that the State bore the burden of disproving the existence of sudden heat. We must conclude, consistent with our Supreme Court's guidance, counsel did not ignore fundamental error but rather

failed to object to a "technically erroneous" instruction.

Moreover, the failure to object or to tender an alternative and correct instruction does not automatically amount to ineffectiveness of counsel. Rather, according to Strickland, Lomax must show there is a reasonable probability that, but for the error or omission, the result of the proceeding would have been different. As previously observed, sudden heat is the evidentiary predicate which allows the mitigation of a murder charge to voluntary manslaughter. Bane, 587 N.E.2d at 100. "Sudden heat" is characterized as "anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection." Dearman v. State, 743 N.E.2d 757, 760 (Ind. 2001).

Here, the post-conviction court found that Lomax had not suffered prejudice from the erroneous instruction because there was no evidentiary predicate for the existence of sudden heat and, therefore, no reasonable probability that the result would have been different had the jury instruction been correct. We have reviewed the trial record herein and also conclude that it discloses insufficient evidence of provocation to establish sudden heat. The initial altercation between Lomax and Prince occurred two weeks prior to the shooting. On the day of the shooting, there is an absence of evidence that Prince conducted himself so as to render Lomax incapable of cool reflection. Prince remained inside the business premises while Lomax yelled "It's not over with. Tell Rick [Prince] to come out here for he can feel the heat." (Tr. 150.) When Prince did not come outside, Lomax yelled "Tell him to come on out here before I come up in there and get him." (Tr. 155.) Lomax pulled out his gun and ran

[6] See Ind. Code § 35-42-1-3.

into the building after claiming that he would "make him [Prince] scream." (Tr. 218.) After Prince was shot, and attempted to flee, Lomax ran after the wounded man and fired additional shots.

In light of this overwhelming evidence that Lomax acted deliberately and in the absence of provocation from his victim, there is not a reasonable probability that, had a correctly-worded voluntary manslaughter instruction been tendered, the result of the proceeding would have been different and the jury would have convicted Lomax of voluntary manslaughter rather than murder.

II. Ineffectiveness - Involuntary Manslaughter Instruction

Lomax also argues that his trial counsel was ineffective because he did not follow through on his initial request for an instruction on involuntary manslaughter. Trial counsel requested instructions on involuntary manslaughter, battery and criminal recklessness, but verbally withdrew his request for battery and criminal recklessness instructions. The involuntary manslaughter instruction was not given. At the post-conviction hearing, trial counsel could not recall the reason why he did not pursue the giving of that instruction.

Involuntary manslaughter occurs if a person kills another human being while committing or attempting to commit battery. Ind. Code § 35-42-1-4(c)(3). Murder requires at the minimum a killing committed by a perpetrator who engaged in the killing with an awareness of a high probability that he was doing so. Erlewein v. State, 775 N.E.2d 712, 714 (Ind. Ct. App. 2002), trans. denied. Involuntary manslaughter is not an inherently included lesser offense of murder. Evans v. State, 727 N.E.2d 1072, 1081 (Ind. 2000). However, it is

a factually included lesser offense if the charging instrument alleges that a battery accomplished the killing. Id. Where a battery has been alleged, the critical element distinguishing involuntary manslaughter from murder is intent – the intent to kill as opposed to the intent to batter. Erlewein, 775 N.E.2d at 714. When there exists a serious evidentiary dispute about the element distinguishing the greater offense from a lesser included offense, the trial court should give an instruction on the lesser included offense when requested. Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995).

Here, the Information alleged an offensive touching by shooting. Apparently, trial counsel initially believed that an appropriate trial strategy included requesting an involuntary manslaughter instruction. Nevertheless, there is not a reasonable probability that the failure to later ensure that the instruction was given altered the outcome. The trial court need not have given the instruction in the absence of a serious evidentiary dispute. Lomax chased Prince after he was already wounded, and Lomax continued to fire a deadly weapon. The jury could not reasonably have found that Lomax merely intended to batter Prince instead of kill him. Lomax has not demonstrated ineffective assistance of counsel because of the omission of an involuntary manslaughter instruction.

III. Ineffectiveness - Appellate Counsel

Finally, Lomax argues that he was denied the effective assistance of appellate counsel when counsel failed to raise an issue regarding the "fundamentally erroneous instructions on voluntary manslaughter." Appellant's Brief at 19.

Appellate courts should be particularly deferential to an appellate counsel's strategic

decision to include or exclude issues, unless the decision was "unquestionably unreasonable." Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997), cert. denied, 525 U.S. 1021 (1998). To prevail on his claim of ineffective assistance of appellate counsel, Lomax must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens, 770 N.E.2d at 760. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. Id. Even if counsel's choice is not reasonable, to prevail, the petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

As previously discussed, the use of the technically incorrect voluntary manslaughter instruction did not amount to fundamental error, which appellate counsel would have been expected to challenge. Nor was there evidentiary support for a determination of "sudden heat," the element distinguishing voluntary manslaughter from murder. Accordingly, had appellate counsel challenged the voluntary manslaughter instruction, it would not have altered the outcome of the direct appeal. Lomax has not demonstrated the ineffectiveness of appellate counsel.

Conclusion

The post-conviction court did not err in rejecting Lomax's ineffective assistance claims and denying post-conviction relief.

Affirmed.

NAJAM, J., and CRONE, J., concur.